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# THE 1971 PROTOCOL OF GUATEMALA CITY TO FURTHER AMEND THE 1929 WARSAW CONVENTION

RENE H. MANKIEWICZ\*

*The Protocol of Guatemala City, signed on March 8, 1971, further amends the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air. Professor Mankiewicz discusses the scope and meaning of the new provisions of the Protocol and traces the reasons for the modifications in the original Convention. The primary alteration in the system established by the Warsaw Convention, and its first amending Protocol signed at The Hague in 1955, is a new regime of strict liability; an increase in the limits of recovery, particularly in the case of the death or injury of a passenger; and provisions to make the new limit "unbreakable." In addition, Professor Mankiewicz details amendments to certain other articles including those dealing with jurisdiction, passenger tickets, baggage checks and liability for delay. In his conclusion, the author suggests that the lengthy and involved process leading to these amendments could have been avoided simply by following the example established for the carriage of goods under the Convention; that is, by the passenger obtaining insurance if he considered the original limits insufficient.*

## I. INTRODUCTION

### A. Some Background Features

TO PUT the significance and scope of the Guatemala Protocol in proper perspective, it might be convenient to recall the events that led to its adoption.<sup>1</sup> The Convention for the Unification

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<sup>1</sup> See generally, *Symposium on the Warsaw Convention*, 33 J. AIR L. & COM.

of Certain Rules Relating to International Carriage by Air signed at Warsaw on October 12, 1929, is one of the most successful conventions for the unification of private law. It presently applies in ninety-nine states<sup>2</sup> and governs domestic air carriage in many countries. The Warsaw Convention was amended for the first time by The Hague Protocol of September 28, 1955, which increased the limit of liability in case of death of or personal injury to a passenger by 100 per cent, redefined the case of unlimited liability of the carrier, modified the rules relating to the content and delivery of passenger tickets and baggage checks, and introduced other minor amendments. The hope that the Protocol would be rapidly ratified by all states parties to the original Convention was not fulfilled. The Protocol came into force on August 1, 1963, and as of October 31, 1971, had been ratified by seventy-five states.<sup>3</sup> As is well known, the United States refused to ratify the Protocol because of the increased limit, to which it had agreed at The Hague, was finally considered too low.<sup>4</sup>

As is the case with all uniform law conventions, the Warsaw Convention had genetic defects that resulted in contradictory decisions by national courts.<sup>5</sup> Courts in the United States encountered an additional difficulty because they held that the Convention did not provide a "cause of action."<sup>6</sup> Consequently, they applied their rules of conflicts of law to determine who are, in accordance with article 24, paragraph 2 of the Convention, "the persons who have the right to bring suit and what are their respective rights." As a

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518 (1967); *International Review—International Civil Aviation Organization*, 33 J. AIR L. & COM. 689 (1967).

<sup>2</sup> As of August 1, 1972, according to information published by ICAO on the basis supplied by the Polish Government, depository of the Convention and The Hague Protocol.

<sup>3</sup> *Id.*

<sup>4</sup> For the complete story of the non-ratification of the Protocol and the denunciation of the Convention by the United States, see Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967). See also, Mankiewicz, *The Judicial Diversification of Private Uniform Law Convention*, 1972 INT'L & COMP. L.Q. 718.

<sup>5</sup> For an analysis of, and the reasons for, these inherent defects see Mankiewicz, *Le sort de la Convention de Varsovie en droit écrit et en common law*, 1961 MÉLANGES EN L'HONNEUR DE PAUL ROUBIER 103 (v. II).

<sup>6</sup> For a penetrating analysis of the problems encountered by the United States courts, see Calkins, *The Cause Of Action Under the Warsaw Convention*, 26 J. AIR L. & COM. 217, 323 (1959).

result, American courts would frequently have to apply foreign law that is less favorable than the domestic law to the injured American citizen or resident, or his dependants or personal representatives.<sup>7</sup>

One method used by the United States courts to avoid the application of the Convention and its limitation of liability was to find that the passenger's ticket did not comply with article 3, paragraph 1, sub-paragraph (e) whenever the "statement required by that rule that the carriage is subject to the rules relating to liability established by this Convention" was printed on the ticket in microscopic characters. In these cases, the American courts held that the passenger was not given adequate "notice" of the limitation of liability established by the Convention.<sup>8</sup> These decisions, not followed by foreign courts, except recently by the Superior Court of Montreal,<sup>9</sup> and widely criticized in legal writings, are surprising since it is a well established rule in the United States that the conditions set forth in properly filed tariffs are applicable to passengers even though unknown to them.<sup>10</sup>

After the United States had notified its intention to withdraw from the Warsaw Convention, effective May 15, 1966, the International Civil Aviation Organization and the International Air Traffic Association immediately took steps to reach an agreement on a higher limit of liability in case of the death of or injury to a passenger in the hope this would induce the United States to remain a party to the Warsaw Convention. The non-application of the Warsaw Convention by the United States would have resulted in unlimited liability to all international air carriers when sued in American courts in situations in which the injury or death resulted from the carrier's negligence that, for all practical purposes, would always be presumed under the rules of *res ipsa loquitur*.

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<sup>7</sup> *E.g.*, *Ross v. Pan American Airways, Inc.*, 299 N.Y. 88, 4 Av. Cas. 17,682 (1949), *cert. denied sub. nom.*, *Froman v. Pan American Airways, Inc.*, 4 Av. Cas. 17,682; *Komlos v. Air France*, 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd*, 209 F.2d 436 (2d Cir. 1953).

<sup>8</sup> *Lisi v. Alitalia-Linee Aeree Ataliane*, 253 F. Supp. 237 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 508 (2d Cir. 1966); *Egan v. Kollsman Instr. Corp.*, 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).

<sup>9</sup> *Montreal Trust Co. v. Canadian Pacific Air Lines Limited*, 12 Av. Cas. 17,197 (Sup. Ct. Montreal, Quebec 1971).

<sup>10</sup> *Martin v. Trans World Airlines, Inc.*, 11 Av. L. Rep. 18,231 (Pa. Super. June 22, 1971); *Mao v. Eastern Airlines, Inc.*, 310 F. Supp. 844 (S.D.N.Y. 1970).

When no agreement on a revision had been reached by the states parties to the Convention, the Civil Aeronautics Board, after consultation with major international airlines represented by IATA, issued an order on May 13, 1966, that provided for strict liability of the carrier in case of the death of or personal injury to a passenger and set a limit of 58,000 dollars and 75,000 dollars, respectively, for international air voyages originating, stopping or terminating in the United States.<sup>11</sup> There upon the United States withdrew its notice of denunciation of the Warsaw Convention.

*B. The Breakthrough at the Seventeenth Session of the ICAO Legal Committee.*

After several unsuccessful meetings held during the next four years<sup>12</sup> under the auspices of ICAO, a tentative agreement was reached at the Seventeenth Session of its Legal Committee.<sup>13</sup> At that session the delegate of New Zealand, with the consent of members of the British Commonwealth and certain European states, presented a "package deal" that reflected the United States "minimum position." This proposal was adopted as follows:<sup>14</sup>

1. Strict liability in the case of death of or injury to a passenger, contributory negligence being the only defense admitted. (Adopted 25 to 6).

2. Increase of the limit of liability for death of or personal injury to a passenger to 100,000 dollars. (Adopted 18 to 12 with 6 abstentions).

3. The limit is to be made "unbreakable in all circumstances." (Adopted 29 to 6 with 4 abstentions).

4. Provision for automatic increases of the limit during a certain, but not yet specified, period of time. (Adopted 20 to 13).

5. Increase of the agreed limit by 2,500 dollars per year for

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<sup>11</sup> The CAB formally approved the 1966 Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, Docket No. 17,325, Order No. E-23680, Agreement No. 18900 (CAB May 13, 1966); *see also* CAB Press Release 66-61, May 13, 1966.

<sup>12</sup> One Special Meeting (ICAO Doc. 8584, v. I and II), two sessions of a Panel of Experts (ICAO GE-Warsaw Reports 1 and 2), two sessions of a Sub-comm. of the ICAO Legal Comm. (ICAO LC/SC Warsaw, Reports 1 and 2) and one session of the ICAO Legal Comm. (ICAO Doc. 8878, and for a summary of that session ICAO Doc. 8865).

<sup>13</sup> ICAO Legal Committee, Minutes and Documents, 17th Session, 8878-LC/162 (1970).

<sup>14</sup> *Id.*

twelve years with a Diplomatic Conference, to be convened during the fifth year of the Protocol, to decide whether to amend this arrangement and another Conference convened during the tenth year to decide whether to continue it. (Adopted 18 to 15).

6. Adoption of a "settlement inducement clause" that would permit the allocation to the plaintiff of court costs and attorney's fees in addition to the compensation adjudicated by the court and which, to that extent, would go beyond the agreed limit. (Adopted 17 to 5 with 5 abstentions).

7. Amendment of the rules relating to jurisdiction by providing for the jurisdiction of the court of the domicile or permanent residence of the passenger if the carrier has an establishment in the same contracting state. (Adopted 21 to 14).

The complete proposal was adopted as a whole nineteen to thirteen with six abstentions and became the basis for the Diplomatic Conference that met at Guatemala City during February and March of 1971.

## II. The Provisions of the Guatemala Protocol<sup>15</sup>

The Protocol of Guatemala City, signed on March 8, 1971, has not altered the Warsaw-Hague regime of liability of the international air carrier for the carriage of goods. It maintains the presumption of fault and the limits of liability for carriage of goods as agreed at Warsaw in 1929. For the carriage of passengers and their luggage, however, the Protocol establishes a new system of strict liability, with an "unbreakable" limit of 100,000 dollars in case of death or injury, and supplementary indemnity at the option of a contracting state. In addition, it provides for automatic increases of the limits of liability agreed to at Guatemala City. Amendments were also made in certain articles dealing with jurisdiction, passenger tickets, baggage checks, and liability for delay in the carriage of passengers and their baggage. Some of these amendments recognize, and even endorse, the particular interpretation given certain articles of the original Convention by American courts.

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<sup>15</sup> Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Guatemala City, March 8, 1971, official French, English, and Spanish texts in ICAO Doc. 8932 (1971).

A. *The Principle of Strict Liability and the "Unbreakable Limit"*

An argument repeatedly made during the Hague Conference in 1955, and again during the numerous meetings held under the auspices of ICAO from 1966 to 1970, was that it would be desirable to establish a regime that would provide a high limit and, as a quid pro quo, strict liability in case of the death of or bodily injury to a passenger.<sup>16</sup> The main argument in favor of this scheme was that strict liability with a high limit would be likely to eliminate the lengthy court proceedings that frequently result in cruel and even inhumane questioning and cross-examination of the pilots and crew members called to testify and that saddle the parties with exceedingly high expenses for the expert witnesses who must investigate the circumstances surrounding the accident.<sup>17</sup> Moreover, these proceedings may continue for years because of the plaintiff's efforts to prove that the behavior of the carrier or its employees constituted "wilful misconduct," which entails unlimited liability under article 25, while at the same time the carrier tries to eliminate or diminish his liability by establishing "that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."<sup>18</sup>

The opposing view was that, even under a regime of strict liability, a high limit would be likely to result in a proliferation of court procedures, equally undesirable, on the quantum of damages. Furthermore, an unbreakable limit in the case of wilful misconduct by the carrier or its employees was considered both immoral and contrary to the public policy of most countries. This argument had also been made at The Hague Conference and the choice had already been made between a high limit of liability and an average limit coupled with a more strict definition of the circumstances preventing the carrier from invoking the limit. The Hague Conference had opted for the second alternative.<sup>19</sup> The pressure applied and re-enforced over the years by many states under the leadership of the United States, however, resulted in the adoption of the first

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<sup>16</sup> See Mankiewicz, *The Hague Protocol to Amend the Warsaw Convention*, 5 AM. J. COMP. L. 78 (1956).

<sup>17</sup> See Kreidler, *A Plaintiff's View of Montreal*, 33 J. AIR L. & COM. 528 (1967).

<sup>18</sup> See article 20 of the Warsaw Convention.

<sup>19</sup> See note 15 *supra*.

alternative by the Guatemala City Conference. The Guatemala Conference decided to establish a regime of strict, or absolute, liability for the death of or injury to a passenger, provided that the new limit would be "unbreakable." Moreover, it was agreed that strict liability would also apply to damage sustained in case of the destruction or loss of, or damage to, a passenger's baggage, whether checked or carried.

The Guatemala Conference concluded that the carrier should be liable in the event of damage resulting from war, civil disorder, sabotage, hijacking or other similar circumstances. The only two defenses granted to the carrier are contributory negligence and the state of health of the passenger or the latent defect of his baggage.

### *B. The Implementation of the Principle of Strict Liability*

*Article 17—Strict Liability.* Article 17 amended the original Convention to replace "if the accident which caused damage so sustained" with the words "upon condition only that the events which caused the death or injury." The first sentence of paragraph 1 of article 17, as amended, reads as follows:

1. The carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

A second paragraph was added to article 17 which reads as follows:

2. The carrier is liable for damage sustained in case of destruction or loss of, or damage to, baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or during any period within which the baggage was in charge of the carrier."

This new rule not only extends strict liability to loss of, or damage to, baggage, but it also redefines the period during which the damaging event must have occurred to result in the carrier's liability. Article 18 of the original Convention defined the period differently, and this definition was retained in the Guatemala Protocol with respect to the carrier's liability for destruction or loss of, or damage to, cargo.



Furthermore, under the original Convention, and as it was amended at The Hague, the presumption of fault of the carrier or its agents applied only to checked baggage, and not to hand-baggage kept by the passenger. The determination of the basis of liability with respect to hand-baggage had been left to national legislation. But different limits for checked baggage and baggage kept by the passenger had been established by paragraphs 2 and 3 of article 23. At Guatemala City a new paragraph 3 was added to article 17 that provides that strict liability and its unbreakable limits apply to both checked baggage and "objects carried by the passenger."

*Article 20—Exception from strict liability: delay in the carriage of passengers and their baggage.* The only instance in which damage suffered by the passenger, either to his person or with respect to his luggage, that is not subject to absolute liability is damage resulting from delay. Thus the Guatemala Protocol maintains the old system of presumption of fault against the carrier or its agents for such damage; but the amendments to article 25 and 25A<sup>20</sup> exclude any possibility of their liability becoming unlimited. Nevertheless, the establishment of absolute and strictly limited liability necessitated certain drafting changes in the rules of article 20 relating to delay.

Article 20, as amended at The Hague in 1955, had only one paragraph that provided for complete exoneration of the carrier, "if he proves that he and his agents had taken all necessary measures to avoid the damage or that it was impossible to him or them to take such measures." Since under the new scheme that rule applies either to delays of the carriage of passengers and baggage or for the loss of, or damage to, cargo, article 20 was divided into two paragraphs—the first applying to the carriage of passengers and their baggage, and the second for the carriage of cargo.

### C. Defenses Against Strict Liability

*Article 17—State of health of the passengers and defect or vice of baggage.* Article 17, paragraph 1 was amended to provide that the carrier, "is not liable if the death or injury resulted solely from the state of health of the passenger." Because of the use of the word "solely," it is submitted that the carrier does not escape liability if

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<sup>20</sup> See discussion of article 25 and 25a *infra*.

the state of health of the passenger was only contributing to the damage. Similarly, the second sentence of the new paragraph 2 of article 17 provides that the carrier is not liable "if the damage resulted solely from the inherent defect quality or vice of the baggage." There is no parallel to these rules in the original Convention or in The Hague Protocol. It is generally agreed, however, that "force majeure" was a defense under article 20, paragraph 1 of the original Warsaw Convention, and therefore was believed to apply to damage caused solely by an inherent defect of the luggage.

*Article 21—Contributory Negligence.* The introduction of absolute liability did not require amending article 21 once it was agreed that contributory negligence would remain a good defense.<sup>21</sup> This article, however, has been redrafted for two reasons. First, in 1929, when the Warsaw Convention was drafted, contributory negligence was a complete bar to recovery in some countries, while elsewhere it merely mitigated the recoverable damages. To accommodate both situations, the original article 21 provided that in case of contributory negligence "the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability." Because most national laws have since been amended to abolish contributory negligence as an absolute defense, the Guatemala Protocol redrafted article 21, paragraph 1 to make complete or partial exoneration of the carrier compulsory, leaving, however, the courts free to apportion liability between the carrier and the passenger.

The second reason for the revision was that article 21 had been poorly drafted. It referred to the negligence of "the injured person,"<sup>22</sup> an expression that, strictly construed, referred only to the person having suffered damage. This resulted in barring an effective defense of contributory negligence when the damage action was brought by a person claiming damage by reason of the death of or injury to a passenger. The new wording of article 21 makes it clear

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<sup>21</sup> Opponents of the retention of that defense argued that it had no place in a system of absolute liability because "contributory negligence" recognizes and evaluates the respective degrees of fault of the tortfeasor and the injured person, and strict liability is not reckoning any fault of the former. Hence, in a system of strict or absolute liability, "contributory negligence," if admitted at all as a defense, ought to mean any behavior of the plaintiff which has contributed to the damaging event or increased the damage cause.

<sup>22</sup> "*Personne lésée*" in the authentic French text.

that the "negligence" that may wholly or partially exonerate the carrier is the passenger's negligence.

#### D. *The New Limits*

*Article 22—Death or Personal Injury to Passengers.* The Conference decided that the limit of 100,000 dollars (1,500,000 gold francs) would apply to "the aggregate of the claims, however founded, in respect to damage suffered as a result of the death or personal injury of each passenger." While this wording is new, there was apparent agreement that the limit established by article 22, paragraph 1 applied only to the aggregate of claims made by the heirs or dependent members of the family of the fatally injured passenger (those persons entitled under the Fatal Accident Acts in common law countries).<sup>23</sup> The new wording as well as certain amendments to article 24<sup>24</sup> appear to result in the new limit now encompassing any compensation claims of *any* person who has directly or indirectly suffered damage through the death of or injury to the passenger and is entitled to compensation under the applicable national law, *e.g.*, an employer or a rescuer. If so broadened, this would be quite an extraordinary extension of the scope of the amended Warsaw Convention.<sup>25</sup>

*Delay of Passengers.* Paragraph 1, sub-paragraph b fixes the limit of liability for delay "for each passenger" at 4,150 dollars (62,500 gold francs). It is interesting to note that this rule does not refer to "the aggregate of claims" and would therefore permit a like maximum amount to be claimed by any third person who is entitled to compensation under the applicable national law for damages suffered by reason of the passenger's delay.<sup>26</sup> Certainly,

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<sup>23</sup> In common law countries this would apply to the persons entitled to recovery under the various Fatal Accidents Acts.

<sup>24</sup> See note 25 *infra*.

<sup>25</sup> With respect to annuities, the original Convention provided that damages could be awarded, in accordance with the law of the court, in the form of "periodical payments." It specified in the French authentic text the "rent capital shall not exceed that limit" namely the limit established in the preceding sentence of article 22. The official, but not authentic English—but not the Spanish—texts had translated that sentence as follows: "The equivalent capital value of the said payments shall not exceed 125,000 francs" (i.e. the limit established in article 22, paragraph (1)). The Guatemala Protocol re-establishes identity of the three authentic texts by providing as follows: "The equivalent capital value of the said payment shall not exceed 1,500,000 francs"; see article 22, paragraph (1)(a).

<sup>26</sup> For example, a theatre could be a third party when an actor is injured who

defendants would plead that these claims are completely excluded or, seen the other way, included in the maximum limit because of the use of the words "per each passenger." It may be equally well argued that these words merely limit each claimant to 62,500 gold francs.

*Destruction, loss, damage and delay of baggage.* The limit for destruction, loss, damage and delay of baggage is set at 1,000 dollars (15,000 gold francs) for each passenger in article 22, paragraph 1, sub-paragraph c.<sup>27</sup>

#### E. Amendments Making the New Limits "Unbreakable"

As previously mentioned, a majority of delegates at the Seventeenth Session of the ICAO Legal Committee agreed to a system of strict liability only on the condition that under no circumstances may compensation be awarded that would be greater than the new limits established in article 22, paragraph 1. To achieve this goal, the Protocol of Guatemala City amended articles 22, 24, 25, and 25A to make the limits unbreakable. Amendments to articles 3 and 4, although made for other reasons, are to the same effect.

*Article 22—Elimination of more favorable stipulations.* Article 22, paragraph 1 was partially amended by inserting in the new sub-paragraph a the words "the aggregate of the claims, however founded, in respect of damage suffered as a result of the death of personal injury of each passenger." A further amendment to article 22, paragraph 1 deletes the sentence "[n]evertheless, by special contract, the carrier and the passenger may agree to a higher limit," which, incidently, had been used as an alibi for the previously mentioned order of the Civil Aeronautics Board.<sup>28</sup>

It is understandable, and altogether necessary, that article 32 remained unchanged and provides that "[a]ny clause contained in the contract and the special arrangements entered into before the damage occurred" that purport to infringe or by-pass "the rule laid down by this Convention . . . shall be null and void." But it is difficult to understand why more favorable arrangements between

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was to perform, or the vendor or buyer of a machine that requires the injured plaintiff to assemble it.

<sup>27</sup> See note 19 *supra*.

<sup>28</sup> See note 10 *supra*.

the carrier and the passenger are now forbidden as a consequence of the elimination of the last sentence of article 22, paragraph 1, unless it is assumed that the passenger and his dependents shall under no circumstances be permitted to obtain compensation in an amount higher than the "unbreakable limit." On the other side, it will be noted that the amendment efficiently prevents governments and airline associations from ordering carriers to promise in their tariffs compensation higher than the maximum established by the Guatemala Protocol,<sup>29</sup> as was done under the CAB order of May 1966 with respect to the Warsaw-Hague limits. If such a promise is made, however, in an individual contract, through published tariffs or otherwise, can one expect the airline to plead the defense provided by the deletion of the last sentence of article 22, paragraph 1 or by article 24, as amended, namely, that one cannot raise the limit by "special contract"? Or further that the court will uphold such a defense?

*Article 25 and 25A—Exclusion of unlimited liability in case of wilful misconduct.* Both Article 25, which had undergone important drafting amendments at The Hague Conference, and article 25A, added by that Conference, provide for unlimited liability of the carrier and its servants and agents when the damage resulted from an act or omission "done with the intent to cause damage or recklessly and with the knowledge that damage would probably result"; the carrier, however, was liable for the acts or omissions of its servants or agents only if they acted within the scope of their employment. These provisions applied both to the transportation of passengers and their luggage, and to the transportation of goods. At the Guatemala Conference the two articles were amended to apply only to damage arising during carriage of cargo.

*Article 24—Actions in tort and in contract.* Article 24 of the 1929 Warsaw Convention, which had not been amended at The Hague in 1955, stipulates that any action for damages "however founded" could only be brought "subject to the conditions and limits set out in this Convention." The main purpose of the words "however founded" is to insure that if the Convention is construed as dealing with only the contractual liability of the carrier, then the

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<sup>29</sup> This was done by Order No. E-23680 (CAB May 13, 1966) with respect to the limits of the Warsaw-Hague scheme.

plaintiff cannot bypass the "conditions and limitations set forth therein" by bringing a tort action, and vice versa.<sup>30</sup> Although article 24, paragraph 1 was amended at Guatemala City, this rule still applies to carriage of cargo. But the Guatemala Protocol specifies the meaning of the words "however founded" with respect to actions for damages arising from the carriage of passengers and baggage, by adding the following wording: "whether under this Convention or in contract or in tort or otherwise."

The authors of the Guatemala Protocol were visibly concerned with the possibility of inventive judges or astute plaintiffs finding methods of circumventing the Warsaw Convention by construing the "real" meaning of its articles. To frustrate these temptations, the authors added the following peremptory sentence to article 24, paragraph 2: "Such limits of liability constitute maximum limits and may not be exceeded, whatever the circumstances which gave rise to the liability."

The meaning of the words "otherwise" and the phrase "whatever the circumstances which gave rise to the liability" may become very controversial questions of interpretation, especially in the light of the aforementioned amendment to article 22, paragraph 1, sub-paragraph b relating to "the aggregate of the claims, however founded."

Under a literal interpretation, which indeed appears consonant with the natural meaning of the words, they apply to "any claim whatsoever" arising from the death of or injury to a passenger, with the result that all claims are governed by the conditions and limitations of the Warsaw Convention and that the carrier is not obliged, on account of the death of or injury to any passenger, to pay compensation per passenger in higher amounts than the established limit in article 22, paragraph 1, sub-paragraph a irrespective of the number of claimants and their cause of action. Since the Warsaw Convention does not determine "who are the persons who have the right to bring suit and what are their respective rights,"<sup>31</sup> it would follow from that construction under their applicable national law, an employer could claim compensation for damages

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<sup>30</sup> On the legal basis of the carrier's liability under the Warsaw Convention, see notes 5 and 6 *supra*; Markiewicz, *Charter and Interchange of Aircraft and the Warsaw Convention*, 1961 INT'L & COMP. L.Q. 707.

<sup>31</sup> See article 24, paragraph 2, where these words are taken from the original Convention.

for the injury to or death of his employee, or likewise a rescuer for damages suffered during the rescue, then these claimants must compete with the persons entitled under Fatal Accident Acts or similar legislation, for an allocation of the maximum compensation that can be accorded under the amended Convention. This would also mean that the Convention not only unifies, and incidentally amends if necessary, the national law of international air carriers' liability but also directly or indirectly modifies the general tort law of states that ratify, or adhere to, the Guatemala Protocol. This writer believes on the evidence of the "travaux préparatoires" of the original Convention that this would go far beyond the scope of the Convention as determined by its authors. They had no intention whatsoever to deal with general contract or tort law of national states,<sup>32</sup> but merely intended to equitably allocate the "risks of air navigation" among air carriers and their clients. If this is a correct interpretation of the purpose and scope of a convention "for the unification of certain rule relating to international carriage by air," then a more restrictive interpretation must be put on the words inserted in article 24 and on the words "however founded" introduced in article 22, paragraph 1.

*Article 30A—Right of recourse against third persons.* Whatever the Convention provides with respect to claims legally made against the carrier and its servants or agents by passengers and their representatives, or eventually by third persons, there seems to be no doubt that the Convention's rules do not deprive the carrier nor its servants and agents of the rights they may have against anybody for recovery of the damage they have suffered as a consequence of the events that resulted in damage to, or the death of, the passengers and other persons. Needless to say, their possible damage is diminished through the limitation of compensation owned by them under the Convention. Nevertheless, the authors of the Guatemala Protocol found it necessary to add a new article 30A in the Convention:

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has the right of recourse against any other person.

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<sup>32</sup> Thus the Convention does not deal with substantive conditions of the contract, as opposed to formal conditions, error of the parties and beneficiary clauses.

If the person liable under the Convention's provisions is not the air carrier (or its servant or agent), who is? Further, why should the Warsaw Convention, even as amended at Guatemala City, take care of such person?

*Article 3 and 4—The form and content of the ticket and the baggage check.* Articles 3 and 4 as amended at The Hague in 1955 provide that the passenger ticket and the baggage check (if not combined with a passenger ticket) must contain a "notice" relating to the limitation of liability under the Warsaw Convention, when applicable; if the carrier permits a passenger to embark without a ticket, or baggage check, having been delivered or if the ticket or baggage check does not include the notice afore-mentioned, the carrier's liability is unlimited. The corresponding provisions of the original 1929 Convention have produced strange decisions as a consequence of the courts' intention to "jump" the limits of liability that were considered too low or otherwise unsatisfactory.<sup>33</sup> To entrench the principle of "unbreakability" of the limit of liability in case of death or injury to a passenger, the Guatemala Protocol deletes the rules of unlimited liability from articles 3 and 4, as amended at The Hague. But it goes even further: to eliminate any new surprises by "creative" interpretation of the provisions referring to the "statement," or "notice," required under articles 3 and 4, those provisions were also deleted.

These amendments have the advantage of permitting delivery of the ticket or baggage check on board the aircraft, as is often done on commuter flights, and also of accommodating the already foreseeable trend towards automatic ticketing. This was made quite clear by the addition of new paragraphs 2 in articles 3 and 4 that "any other means which would preserve a record of the information [relating to the places of departure and destination and agreed stopping places] may be substituted for the delivery of [the passenger ticket or the baggage check]." Concerning the practice occasionally prevailing with respect to tickets for group or chartered flights, a further amendment to article 3 (inserted in its paragraph

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<sup>33</sup>It should be observed that the decisions in note 8 *supra* deal with the original Convention that required a "statement," and not a "notice" as do the articles amended by The Hague Protocol, which the United States has not implemented.



1) permits the issue of a "collective document of carriage" for passengers.

F. *Exceptions to the "Unbreakable Limit"*

Although the limit of liability for damage resulting from death or injury of a passenger has become "unbreakable" by the foregoing amendments and constitutes a "maximum" compensation, the Guatemala Protocol provides two instances in which additional amounts can be awarded to the injured passenger and to persons claiming compensation by reason of his death or personal injury in two instances.

*Court costs and attorney's fees.* To retain the entire compensation allocated by the court by the claimant in cases when the applicable national law, as in the United States, prevents the court from awarding to the successful plaintiff court costs and attorney's fees, The Hague Protocol added a new paragraph to article 22 permitting these costs to be allocated in addition to the compensation. This rule has been retained, although with some drafting amendments, and is a *de facto* exception to the principle of the "unbreakable" limit.<sup>34</sup>

*Supplementary compensation.* Furthermore, despite the "unbreakable limit," states are permitted to arrange for a supplemental payment in addition to the compensation payable under the Convention for death or personal injury of passengers. While certain states had considered a limit equivalent to 100,000 dollars as much too high and amounting to an unlimited liability as far as their nationals were concerned, the United States considered it too low. Consequently, the United States proposed, and the Conference accepted, the establishment of a supplementary compensation scheme

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<sup>34</sup> The Hague rule, which is of particular significance for United States claimants, has never applied to them, due to the failure of the United States to ratify The Hague Protocol. The new paragraph (3)(c) of article 22 clarifies specifically that these costs and reasonable fees "shall not be taken into account in applying the limits established by the Convention" as amended at Guatemala City. The award of costs, however, including fees, can only be made if "the claimant gives a written notice to the carrier of the amount claimed including the particulars of the calculation of that amount and the carrier does not make, within a period of six months after his receipt of such notice, a written offer of settlement in an amount at least equal to the compensation awarded within the applicable limit," the period of six months being extended until the time of commencement of the action, if that is later. (Article 22(3)(b)).

at the option of each contracting state, provided the scheme complied with the following conditions of the new article 35A:

(i) "It shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under this Convention."<sup>35</sup> Thus, the cost for providing supplementary compensation must be borne exclusively by the "system" itself, and the guarantee of any supplementary compensation may not in any way alter the legal regime of liability, nor the limits established by the Protocol.

(ii) The "compensation" shall not be financed by the carriers. Otherwise, the carriers of the country establishing the scheme would be at a disadvantage compared to their foreign competitors. Still, every carrier who sells passenger tickets in a country having adopted the compensation scheme may be required by the government of that country to collect contributions payable by the passengers under the applicable legislation.<sup>36</sup> This duty to collect contributions from passengers can be imposed on every carrier, irrespective whether it is a national of, or has its headquarters in, that state. It is surprising, but not entirely new, that the foreign carriers hereby become the tax collectors of the state in which they are doing business. But they already play that role with respect to various taxes, duties and levies, such as airport taxes or taxes on the sale of tickets. If a carrier were to refuse to collect these taxes, levies or contributions, it risks the cancellation of its operating license in that state.

(iii) The supplementary compensation scheme must not only be nondiscriminatory with respect to carriers doing business in state, but also be nondiscriminatory to the passengers; it cannot be established for the sole benefit of passengers who are nationals or residents of the state introducing the scheme. Indeed, paragraph (c) of article 35A explicitly prescribes that this scheme "shall not give rise to any discrimination . . . with regard to the passengers concerned and the benefits available to the said passengers under the system shall be extended to them regardless of the carrier whose services they have used." As will be noted, no reference is made in that article to the nationality, permanent residence or domicile of the passenger. Furthermore, paragraph (d) of article 35A pro-

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<sup>35</sup> Article 35A, paragraph (b).

<sup>36</sup> Article 35A, paragraph 1.

vides that persons suffering damage as a consequence of the death or personal injury of a passenger are also entitled to the benefits provided under the system "on the sole condition" that the passenger contributed.

Article 35A is incomplete, probably because of the hasty drafting. For instance, it does not deal with the question of what court will decide whether, and to what extent, the alleged damage exceeds the unbreakable maximum limit. Has the court that allocates the maximum permissible compensation under article 22 jurisdiction to establish that the damage actually suffered is higher than the limit? Is the additional compensation available to persons making a claim after the maximum indemnity has been adjudicated or paid to other claimants, possibly without court proceedings? Are all persons entitled to compensation under the Convention, whether strictly or extensively construed, to be equally benefited under the supplementary scheme? Which national law is to be applied (i) to the question of their entitlement, and (ii) more generally, to the "heads" of recoverable damage?

#### *G. Rules for Automatic Increases of the Limit of Liability in Case of Death or Injury to a Passenger*

The steady increase of the cost and standard of living since the end of World Wars I and II seems to require a constant adjustment of the limit of liability in the case of death or personal injury of a passenger. The discussions that preceded the 1955 Conference of The Hague and the negotiations that followed for five years the tentative denunciation of the Warsaw Convention by the United States have shown the great difficulties in reaching an agreement on an increased limit. These difficulties reflect to a large extent the disparity of economic growth and social conditions in the countries in which the Convention applies. To avoid complicated and protracted negotiations on future increases of the limit, the United States proposed an automatic increase of the limit. This proposal met with great resistance by members of the ICAO Legal Committee and its sub-committees who pointed out that article 41 of the Warsaw Convention already gives each contracting state the right to call at any time "for the assembling of a new international conference in order to consider any improvements which may be made in the Convention." After the Seventeenth Session, however,

the ICAO Legal Committee agreed to accept the "package deal" providing for automatic review and periodic increase of the new limit. The Conference at Guatemala City implemented that decision by inserting a new article 42 in the Warsaw Convention.

Under article 42, on December 31 of the fifth and tenth years after the date of entry into force of the Protocol of Guatemala City, the limit then in force for liability in case of death or injury to a passenger is increased by 187,500 gold francs. Moreover, conferences of the parties to the Guatemala Protocol are convened during the fifth and tenth years, respectively, and may "by a two-third majority vote of the [p]arties present and voting" decide that the limit then in force be increased by a lesser amount. While paragraph 2 of the new article 42 does not permit the conference to increase the limit by an amount exceeding 187,500 gold francs, it is submitted that a diplomatic conference composed of sovereign states may decide whatever they want, although one may expect that the vote of an increase above the said amount would require unanimity since a two-thirds majority is required for an increase below that amount.

The coming into force of the Hague Protocol had raised the question whether the increased limit provided by that Protocol would apply to damages caused before its entry into force but liquidated after that date. Those who believe that the Warsaw Convention deals with the conditions of the *contract* of carriage, felt that the limit established by The Hague Protocol applies only to damage caused after its entry into force.<sup>37</sup> One may argue on the other side, with this writer, that the Warsaw Convention establishes in fact statutory liability for international air carriers based on public policy considerations. In that case, the Hague limit applies to all damages not liquidated at the date of its entry into force.

The Guatemala Protocol has settled that question, at least for the increases of the Guatemala limit at the end of the fifth and tenth years after its entry into force, by providing in paragraph 4 of article 42 that "the applicable limit shall be that which, in accordance with the preceding paragraphs is in effect on that date of the event which caused the death or personal injury of the passenger." The words "in accordance with the preceding para-

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<sup>37</sup> Pontavice, 1971 *Revue Trimestrielle le de Droit Commercial* no. 1; French Supreme Court, 1967 *Revue Francaise de Droit Aérien* 4.

graphs" make it clear that this rule does not apply to the limit established by the Guatemala Conference. Having dealt with the effective date of the increases occurring afterwards, it is astonishing that the Conference did not deal with the prospective effect of the coming into force of the limit established at Guatemala City.

*H. Other Amendments Made by the Protocol of Guatemala City Jurisdiction.* Under article 28 of the Warsaw Convention a damage suit can be brought only in the territory of a contracting state and "either before the court of the domicile of the carrier or of his principal place of business, or where he had a place of business through which the contract was made, or before the court of the place of destination." This limitation of the number of courts having jurisdiction under the Convention was intended to prevent plaintiffs from by-passing the conditions and limitations established by the Convention by suing in the courts of the state in whose territory the accident occurred, but which may not happen to be a party to the Convention; in which case its courts could not apply its provisions.

In many instances, this rule makes it impossible for citizens and permanent residents of the United States to bring their damage suits under the Convention before an American court, and thereby insure the application of the domestic law of the United States for the determination of the "persons and their rights" mentioned in article 24 of the Convention. Furthermore, United States courts are somewhat reluctant to admit that the dependents and personal representatives of an American passenger killed in an aircraft accident abroad are prevented by article 28 of the Convention from suing the foreign airline before a court in the United States. Some courts avoided this situation either by finding that although the foreign carrier did not have an "establishment" in the United States as required by that article, the carrier at least had a place of business there, or by finding it had been represented in the United States by the American airline or travel agent who had sold ticket. The courts also held that the foreign airlines could be used in any court in the United States having jurisdiction under its local law, provided the place relevant under article 28 was situated in the United States.<sup>38</sup> While the proposal to give jurisdiction to the court

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<sup>38</sup> See *e.g.*, *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 219 F.

either of the domicile of the claimant (who, in many cases, may not be the passenger) or alternatively, of the domicile of the passenger<sup>39</sup> met with hostility, the Conference of Guatemala City agreed to amend article 28 by also giving jurisdiction to the court, if in the territory of a contracting state, within which the carrier has an establishment if the passenger has his domicile or permanent residence in the same state.

*Carriage of military personnel on chartered aircraft.* The United States encountered certain difficulties with the application of the Warsaw Convention to the transportation of military personnel by civil aircraft chartered by the Military Air Transport Command, since the Convention applies to all carriage that is "international" within the meaning of article 1, except the carriage of mail and postal packages.<sup>40</sup> Under the Additional Protocol to article 2 each party to the Convention can declare at the time of ratification or adhesion that the Convention shall not apply "to international transportation by air performed directly by the [s]tate. . . ." Had the United States ratified that Protocol, transportation of military personnel by civil aircraft chartered by military authorities would still be governed by the Convention because this transportation is not "directly" performed by the government.<sup>41</sup>

To permit this transportation to be exempted from the application of the Warsaw Convention, the Guatemala Conference decided to provide, as did The Hague Protocol, which the United States has not ratified, that a state may "at any time declare by notification addressed to the International Civil Aviation Organization that the Warsaw Convention as amended at The Hague, 1955, and at Guatemala City, 1971, shall not apply to the carriage of persons and cargo for its military authorities on aircraft, registered

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Supp. 289 (S.D.N.Y. 1963), *rev'd* 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966); *Chankalian v. Aerovias Quisqueyana*, 10 Av. Cas. 17,353 (1967); *Gordon v. Braniff Airways, Inc.*, 284 N.Y.S.2d 437 (Nassau Co. 1967); *Eck v. United Arab Airlines*, 15 N.Y.2d 53, 203 N.E.2d 640, 255 N.Y.S.2d 249 (1964).

<sup>39</sup> See Mendelsohn, *A Conflict of Laws Approach to the Warsaw Convention*, 33 J. AIR L. & COM. 624 (1967); ICAO Legal Committee, *Minute and Documents*, 17 Sess., 8878-LC/36 (1970).

<sup>40</sup> See article 2 of original Convention as amended at The Hague, 1955.

<sup>41</sup> *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965).

in that [s]tate, the whole capacity of which has been reserved by or on behalf of such authorities"; the notification may be withdrawn at any time.<sup>42</sup>

*Consequential miscellaneous amendments.* Since the original Warsaw Convention had established a single system of liability for the carriage of passengers and their registered luggage as well as for the carriage of cargo, some of its articles deal simultaneously with both types of transportation. The same single system applies to The Hague Protocol. But the Guatemala Protocol has introduced a dual liability regime by adopting a new system of strict liability for the carriage of passengers and their luggage. Hence, it became necessary to make purely drafting changes in some of the articles relating both to carriage of passengers and luggage and that of cargo.<sup>43</sup>

### I. *Application of the Guadeljara Convention*

At various times, there have been differences of opinion with respect to which carrier is liable under the Warsaw Convention when the transportation is not performed by the carrier with whom the passenger has made the contract of carriage, *e.g.*, the charterer or lessee of the aircraft.<sup>44</sup> While the majority of scholars and courts believe that either carrier can be sued under the Warsaw Convention,<sup>45</sup> it was considered convenient to state explicitly this conclusion in a Convention supplementary to the Warsaw Convention signed at Guadeljara on September 18, 1961. The rules of that Convention have been made applicable to carriage by air under the Warsaw Convention by article XXV of the Guatemala Protocol, which specifically provides that, as between the parties to the Protocol that are also parties to the Guadeljara Convention, "any reference to the 'Warsaw Convention' contained in the Guadeljara Convention shall include reference to the Warsaw Convention as amended at The Hague, 1955, and at Guatemala City, 1971."

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<sup>42</sup> This had been done by The Hague Protocol, which the United States had not ratified, see article 27, paragraphs 1(b), and 2.

<sup>43</sup> Pure drafting amendments occurred in articles 18, 20, 22, 24, 25 and 25A. See also V, VI, VII, IX, XX and XXI of the Guatemala Protocol.

<sup>44</sup> *E.g.*, the charterer or lessee of the aircraft.

<sup>45</sup> Mankiewicz, *Charter and Interchange of Aircraft and the Warsaw Convention*, 1961 INT'L & COMP. L.Q. 707.

### J. *Ratification and Entry into Force of the Protocol*

Originally only states members of the United Nations or any of its specialized agencies could sign, ratify or adhere to a Convention concluded under the auspices of the ICAO. The Guatemala Conference, however, following a precedent established in December 1970 by the Convention on Suppression of Unlawful Seizure of Aircraft,<sup>46</sup> decided that the Protocol shall be open and can be ratified by "all [s]tates [m]embers of the United Nations or of any of the Specialized Agencies, or of the International Atomic Energy Agency or [p]arties to the Statute of the International Court of Justice, and by any other [s]tate invited by the General Assembly of the United Nations to become a party to the Protocol."<sup>47</sup>

The Guatemala Protocol, like The Hague Protocol, requires thirty ratifications for its coming into force. As mentioned before, the expectation that, once The Hague Protocol was ratified by thirty states, all other states parties to the original Warsaw Convention would follow suit, was not fulfilled after the United States refused to ratify that Protocol. Consequently, international air carriage is now governed by two slightly different treaties or, if neither applies, by national laws. The Guatemala Conference wished to avoid a further deterioration of the situation that would occur if the new Protocol came into force in thirty states while not being applied by the states that are the leaders in the field of international civil aviation. Therefore, article 20 provides that the Protocol comes into force, after the deposit of the thirtieth instrument of ratification, only on the condition that the airlines of five of the ratifying states provide "[forty per cent] of the total international scheduled air traffic of the airlines of the members [s]tates of the International Civil Organization in 1970." The total international scheduled air traffic is to be calculated on the basis of passenger-kilometers according to the statistics for the year 1970 published by the International Civil Aviation Organization.

### K. *Coordination of, and Conflicts of Law Between, the Warsaw Convention, The Hague Protocol and The Guatemala Protocol*

The Guatemala Protocol contains only the amended text of those

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<sup>46</sup> Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature Dec. 16, 1970, ICAO Doc. 8920 art. 11.

<sup>47</sup> See article XVII.



articles of the original Convention that have been modified by it, and does not reproduce the articles amended by The Hague Protocol nor the articles of the Convention that have never been modified. Hence, the ratification of the Guatemala Protocol does not produce any practical effect if ratified by a state not already a party to either The Hague Protocol or the Warsaw Convention. To prevent that state from having to deposit three different instruments of ratification (two of which would have to be deposited with the government of Poland, and the third with the ICAO) article XIX, paragraph 2 provides that "ratification of this Protocol by any [s]tate which is not a [p]arty to the Warsaw Convention or of any [s]tate which is not a [p]arty to that Convention as amended at The Hague, 1955, shall have the effect of accession to the Warsaw Convention as amended at The Hague, 1955, and at Guatemala, 1971."

While article XVII of the Guatemala Protocol provides that "as between the [p]arties to the Protocol," the Warsaw Convention as amended at The Hague, 1955, and this Protocol "shall be interpreted together as one single instrument and shall be known as the Warsaw Convention as amended at The Hague, 1955, and at Guatemala City, 1971"; nevertheless, the fact remains that each of the three instruments has a different scope of application. Each instrument applies only to international carriage that begins and terminates in a state party to that instrument, in accordance with article 1 of the 1929 Convention and articles XVII and XVI, respectively, of The Hague and Guatemala Protocols. A number of conflicts of law problems could therefore arise if a carriage originates in a state that is a party to the 1929 Convention but terminates in a state party to The Hague Protocol (i.e. The Warsaw Convention as amended at The Hague, 1955); or where the point of departure is in a state party to the Convention and the point of destination in a state party to the Guatemala Protocol, (i.e. the Warsaw Convention as amended at The Hague, 1955, and at Guatemala City, 1971); or furthermore, where the transportation originates and terminates in states, one of which is a party to The Hague Protocol and the other a party to the Guatemala Protocol.

The authors of the Guatemala Protocol have eliminated an appreciable number of these possible conflicts of law by providing in article XVI that the Convention, as amended at The Hague and

at Guatemala City, applies only to carriage that begins and terminates in a state that is a party to the Guatemala Protocol, or is a round trip originating in that state with an agreed stopping place in any other state. This rule, when applied in conjunction with article 17, has the following consequences: If either the place of departure or the place of destination is situated in a state party to the 1929 Convention and the other in a state party to The Hague or Guatemala City Protocols, the carriage falls within the scope of the 1929 Convention; similarly, the Convention, as amended at The Hague, 1955, applies to any carriage that either begins (or ends) in a state party to The Hague Protocol or terminates (or begins in a state party to the Guatemala Protocol.

In spite of the ingenious solution adopted by article 16 of the Guatemala Protocol, which incidentally, has its counterpart in article 17 of The Hague Protocol, conflicts may still arise in specific situations between the 1929 Convention and the two Protocols as well as between the latter themselves. As shown previously,<sup>48</sup> the number of these conflicts will greatly increase if a party ratifying the Protocol of Guatemala City would at the same time denounce the 1929 Convention, the 1955 Hague Protocol, or both of them.

#### *L. Rules on the Interpretation of the New Protocol*

The careful reader of the three instruments will immediately notice they do not always use the same terminology. The word "goods" used in the original Convention has been replaced by the word "cargo"; "bodily injury" has become "personal injury"; and so forth. At first glance, this may not appear to be particularly important because there exists only one authentic text, in French, of the 1929 Convention; but similar changes have occurred in the French texts of the three instruments.<sup>49</sup> To avoid unnecessary and unwanted difficulties in the construction of the texts raised by these changes in terminology or wording, a final clause of the Guatemala City Protocol, taken from the Hague Protocol, provides that "in case of inconsistency, the text in the French language, in which language the Warsaw Convention of 12 October 1929 was drawn up, shall prevail."

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<sup>48</sup> See note 39 *supra*.

<sup>49</sup> *Conflicts entre la Convention de Varsovie et le Protocole de La Haye*, 1956 REVUE GENERALE DE L'AIR 239.

### M. *Authentic Texts and Depository of the Protocol*

Prior to the Convention on Unlawful Seizure of Aircraft signed in December 1970, air law conventions concluded under the auspices of the ICAO were drafted in authentic texts in English, French and Spanish, the working languages of the Organization. For the Convention of 1970 there also exists an authentic text in the Russian language, the Union of Soviet Socialist Republics having meanwhile become a member of the ICAO. For technical reasons, no authentic text in the Russian language could be opened for signature at Guatemala City; therefore the only authentic texts signed were in English, French and Spanish. But another final clause of the Protocol provides that "the [ICAO] shall establish an authentic text of this Protocol in the Russian language."

The Hague Protocol was deposited with the Polish Government since it amends the Warsaw Convention, which was also deposited with that government. The Conference of Guatemala City, however, decided that the new Protocol should be deposited with the ICAO.

### III. FINAL REMARKS

Two final remarks conclude this analysis of the Protocol signed in Guatemala City. First, if the present disturbances of the monetary exchange lead to a reevaluation of the price of gold, the monetary value of the limits of liability established at Warsaw in 1929, at the Hague in 1955 and at Guatemala City in 1971 will *ipso jure* increase. Moreover, one may expect that states will rapidly ratify the Guatemala Protocol because any delay will postpone the "automatic increases" of the liability limits established at Guatemala City, which are to take place after the fifth and tenth years following the entry into force of the Protocol.

This writer cannot help but wonder why one had to go through all these lengthy negotiations and involved amendments with respect to the limits of liability in the case of carriage of passengers and their luggage while the increase of the limit of liability for the carriage of goods was never raised. The reason for this situation is clearly that shippers of goods who are not satisfied with the limits established at Warsaw in 1929 regularly take out additional insurance for cargo shipped. Therefore, it is difficult to understand why, instead of raising the Warsaw limit for death and injury of a

passenger, including liability for his luggage, it was not agreed to leave it to the individual passenger to take out flight insurance if he considers the limits to be too low.

